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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1923

JAMES O. EASTLAND, et al., *Petitioners,*

v.

UNITED STATES SERVICEMEN'S FUND, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al., *Petitioners,*

v.

NATIONAL PEACE ACTION COALITION, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al., *Petitioners,*

v.

PEOPLES' COALITION FOR PEACE AND JUSTICE, et al.

COMMITTEE ON INTERNAL SECURITY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, et al., *Petitioners,*

v.

PROGRESSIVE LABOR PARTY, et al.

JOINT BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the Court of Appeals in United States Servicemen's Fund v. Eastland is reported at 488 F.2d 1252. (Pet. App. A, pp. 1a-65a). Respondents' applications to the Court of Appeals for stays are not reported but two are set forth in Petitioners' Appendix; the June 4, 1970 opinion and order (Pet. App. B, pp. 67a-68a); the July 28, 1970 opinion and order (Pet. App. C, pp. 69a-70a). An additional emergency stay was granted by the Court of Appeals on July 2, 1970 which is reproduced as Res. App. A.

The opinions of the District Court in United States Servicemen's Fund v. Eastland denying respondents' motion for a preliminary injunction and denying a permanent injunction and respondents' motion to compel testimony are not reported but are set forth in Petitioners' Appendix (Pet. App. D, pp. 71a-80a and Pet. App. E, pp. 81a-84a).

JURISDICTION

The judgment of the Court of Appeals in United

States Servicemen's Fund v. Eastland was entered on August 30, 1973. The judgment in the remaining three cases was entered on October 26, 1973 in conformity with that in United States Servicemen's Fund v. Eastland (Pet. App. G, pp.862-87a). On January 23, 1974, the Court of Appeals denied a petition for rehearing with a suggestion for rehearing en banc (Pet. App. H & I, pp. 88a-89a) filed on behalf of the Congressional defendants by the United States. On April 18, 1974, Mr. Chief Justice Burger extended the time for petitioning for certiorari in all four cases to and including June 22, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Was the lower court correct in exercising its power to consider the constitutionality of a Congressional subpoena for the financial records of a politically controversial organization, which had been served on a third party, without requiring that disinterested third party to risk con-

tempt in order to gain review?

2. Was the lower court correct in concluding that the financial records of a politically controversial organization, which include the names of contributors to that organization as well as the names of individuals and groups receiving its financial support, are protected by the First Amendment?

3. When certiorari is sought by or on behalf of Committees or Subcommittees of the United States Congress and the Solicitor General has failed to file for that relief, should this Court consider that application although the United States is not properly before the Court?

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

Introduction

Certiorari is sought by the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate and by the Committee on Internal Security of the United States House of Representatives. Both committees, although represented by the Department of Justice at all stages below, are now represented by counsel other than the Solicitor General. */

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*/ Petitioners assert an interest on behalf of the United States and the respective constituents of the bicameral Congress. It is the duty of the Solicitor General to conduct litigation in this Court "in which the United States is interested." 28 U.S.C. §518. "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency or officer thereof is a party, or is interested...is reserved to officers of the Department of Justice, under the direction of the Attorney General." [28 U.S.C. 516 (emphasis supplied)] who in turn "shall supervise all [such] litigation...and shall direct all United States attorneys, assistant United States attorneys, and special attorneys...." 28 U.S.C. §519.

There is no indication that counsel for petitioners have been "authorized by law" so that in the absence of the Attorney General through the Soli-

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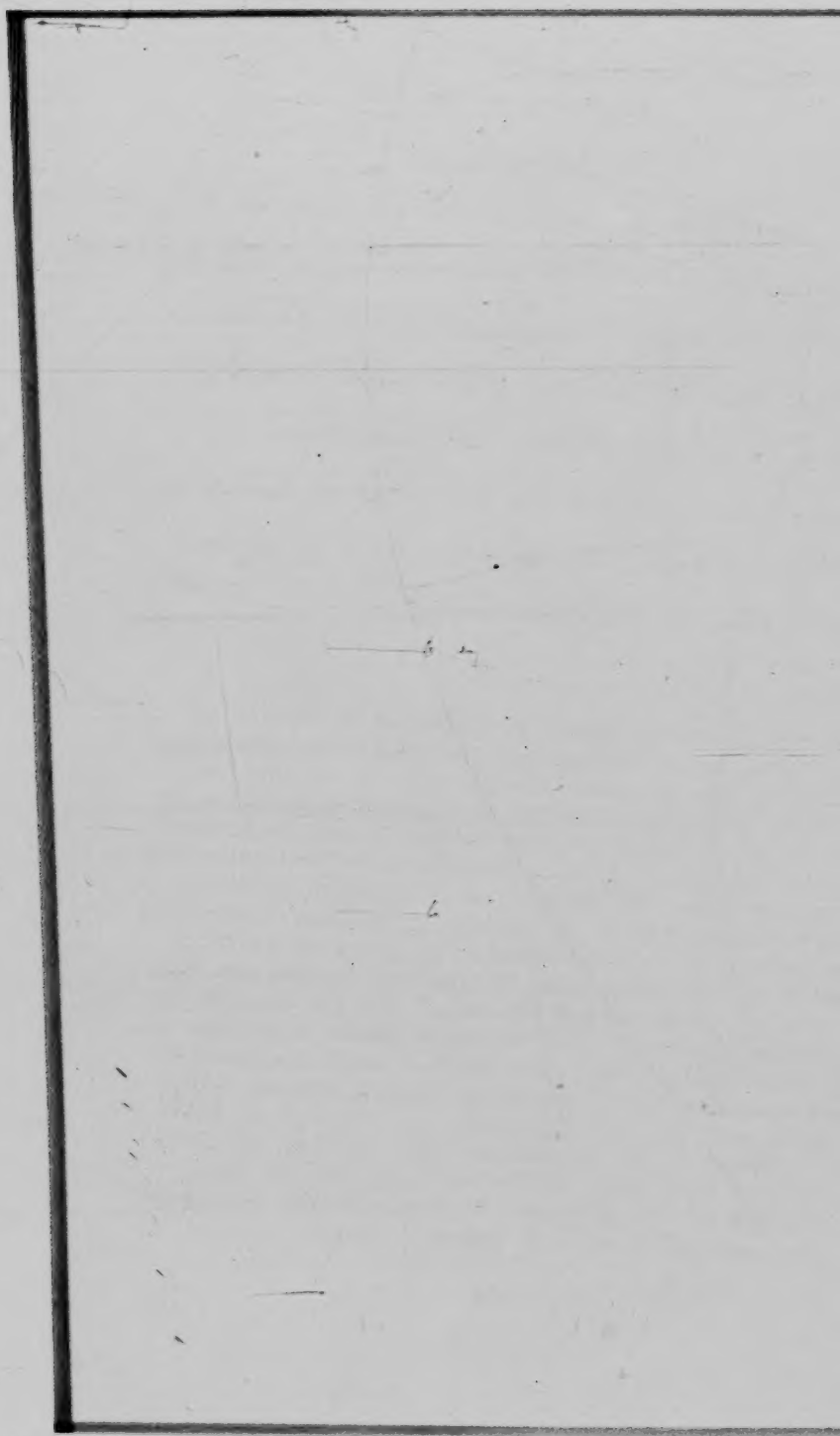

This opposition to the granting of the Petition for a Writ of Certiorari is filed jointly by the United States Servicemen's Fund, the National Peace Action Coalition, the People's Coalition for Peace and Justice and the Progressive Labor Party. Four different subpoenas for organizational bank records resulting in four different lawsuits are the subject of the Petition herein. One subpoena was issued by the Subcommittee on Internal Security of the United States Senate, three were issued by the House Committee on Internal Security.

In only the case of the United States Servicemen's Fund were evidentiary hearings held and full

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(fn. continued from preceding page)

citor General, petitioners may not be properly before this Court. Even if there be some authorization in an unrevealed Congressional resolution, however, at least this Court can and should note the extended time to file granted petitioners and the last minute appearance by private counsel reasonably infer that the Solicitor General determined that he would not seek certiorari because of the absence of merit. See, Stern and Gressman, Supreme Court Practice, 4th Ed. (1969), p. 151.

decisions rendered, the decisions in the other cases, both by the District Court and the Court of Appeals being of a summary nature, in conformity with the Court of Appeals decisions in the United States Servicemen's Fund v. Eastland, (488 F.2d 1252 (D.C. Cir., 1973)). For the purposes of simplicity, respondents will therefore refer herein only to the facts in United States Servicemen's Fund v. Eastland, except where expressly noted.

FACTS

On or about April 20, 1970, the Subcommittee on Internal Security of the United States Senate (hereinafter, the Subcommittee) served a sweeping subpoena on the Chemical Bank of New York demanding the production of

> . . . any and all records appertaining to the United [States] Servicemen's Fund* such records to comprehand papers, correspondence, statements, checks, deposit slips and supporting documentation, or microfilm

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*/ The original subpoena and the resolution authorizing it incorrectly named the organization. The resolution was subsequently corrected and the subpoena re-issued. See page 9 , below.

thereof within your control or custody or within your means to produce.

The United States Servicemen's Fund (hereinafter USSF) is a non-profit tax exempt corporation which is dedicated to the furtherance of the welfare of persons who are serving in the military. Amongst the activities it supports financially are G.I. coffeehouses, newspapers, entertainment, and civilian legal representation for military personnel.

Its bank records, subpoenaed by the Subcommittee, contained the names of USSF's contributors. They also contained the names of all individuals or projects which received financial support from the organization.

Upon notification by Chemical Bank of the Subcommittee subpoena, respondent USSF filed an action for declaratory and injunctive relief in the United States District Court for the District of Columbia. Because of a technical error in the subpoena, it was withdrawn and the civil action dismissed without prejudice to the respondents to file a new ac-

tion should a new subpoena be served.

A new subpoena was issued on May 26, 1970 returnable June 4, 1970. Respondents therefore reinstated their federal action, amending their complaint to seek declaratory and injunctive relief against the new subpoena. They sought a temporary restraining order which was denied on June 1, 1970, on the grounds that the court was without subject matter jurisdiction, that plaintiffs lacked standing to sue, and that plaintiffs failed to demonstrate the probability of success on the merits. The court, however, did not dismiss the complaint. In an emergency appeal to the Court of Appeals, a stay of the subpoena was granted on the morning of the return date, June 4, 1970, "... until the district court has an opportunity to fully consider and to act..." because of the... serious constitutional issues...presented by this litigation which require more time than is presently available for proper consideration."

On June 8, 1970 petitioners applied to the

Court of Appeals with a suggestion for a rehearing en banc. On June 24, 1970, all parties were informed that there was not a majority of the circuit judges in favor of the requested rehearing.

On June 30, 1970, after an evidentiary hearing, the District Court denied respondents' motion for a preliminary injunction on the grounds that irreparable injury had not been established, and that there had been insufficient showing of probable success at a full trial.*/ (Pet. App. D)

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*/ The District Court also considered defendants-petitioners' contentions that (1) the defendants in the case are immune from suit; (2) that plaintiffs lack standing to object to the challenged subpoena; (3) that the complaint raises a non-justiciable issue; and (4) that the complaint fails to state a claim upon which relief can be granted. The court disposed of points (1) and (2) stating "Defendants' first two grounds merit little discussion," citing Powell v. McCormack, 395 U.S. 486 (1969); Flast v. Cohen, 392 U.S. 83 (1968); McSurely v. McClellan, 426 F.2d 664 and Perlman v. United States, 247 U.S. 7, 12-13 (1918). See, Petitioners Appendix, p. 73a. The court then proceded to dispose of defendant's third and fourth contentions concluding the issues presented by plaintiffs are justiciable and that the courts are able to grant the relief requested by plaintiffs relying on Powell v. McCormack, supra; Stamler v.
(fn. continues on next page)

Respondents immediately appealed from the denial of a preliminary injunction and again the Court of Appeals issued an emergency stay on July 2, 1970, pending further consideration. Then, on July 28, 1970, the Court extended the stay writing that "the final judgment is likely to be appealed whichever way the court rules" and that appeal from the denial of the preliminary injunction could be consolidated with the appeal from the final determination of this action." (Pet. App. C)

A hearing on the merits was held on February 23, 1971. Testimony was presented concerning the 50% drop in contributions to the organization following the service of the subpoena as well as testimony from expert witnesses concerning the "devastating effect" of a subpoena of a congressional in-

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Willis, 415 F.2d 1365 (7th Cir., 1969), cert. denied sub nom Ichord v. Stamler, 399 U.S. 929 (1970); and Dombrowski v. Pfister, 380 U.S. 479 (1965). (Pet. App. D, pp. 71a-80a).

vestigating committee on the fundraising capability of a politically controversial organization such as each of the respondents now before this Court. United States Servicemen's Fund v. Eastland, supra, 488 F.2d at 1266. (Pet. App. A, pp.26a and 27a.)

On October 22, 1971, the District Court issued its opinion and order, making no new findings of fact, referring back to its opinion of June 30, 1970 and denying respondents' motion for a permanent injunction. Be referring back to its earlier opinion and order, the District Court reaffirmed its power to rule on the constitutional questions before it, but denied relief on the basis of the facts presented. (Pet. App. E)

Respondent USSF then filed a consolidated appeal in the Court of Appeals.*/ On August 31,

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*/ USSF appealed simultaneously from the denials of temporary, preliminary and permanent relief by the District Court. Its appeals were heard together with the appeals of the House Committee on International Security from the issuance by United States District Judge George L. Hart of preliminary injunctions against its subpoenas for the
(fn. continued on next page)

1973, that Court reversed the judgment of the District Court and held that:

> The showing made by the plaintiffs clearly meets the standards found to exist in those cases in which the Supreme Court has determined that the First Amendment was violated. See NAACP v. Alabama and other cases cited. USSF v. Eastland, supra at p. 1267.*/ (Pet. App. A, p.29a)

It is of that opinion of the Court of Appeals that petitioners seek review.

REASONS FOR NOT GRANTING THE WRIT

I. THE OPINION OF THE COURT BELOW IS IN ACCORDANCE WITH THE LONG ESTABLISHED PRINCIPLES OF PERLMAN v. UNITED STATES.

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bank records of National Peace Action Coalition, People's Coalition for Peace and Justice, and Progressive Labor Party.

*/ The Court of Appeals agreed with the District Court that there was jurisdiction over the subject matter, the issue was justiciable and that there were parties-defendants available who were not immune from suit.

Judge MacKinnon, who dissented from the prior grant of emergency relief also dissented from the final opinion.

The Subcommittee, in its Petition for Certiorari has attempted to characterize the opinion below as a dramatic break from judicial practice by reviewing the constitutionality of congressional committee subpoenas without requiring the subpeonaed party to submit to contempt. In fact the opinion below is fully consistent with the principles established by this Court as early as 1918 in Perlman v. United States, 247 U.S. 7 (1918).

Only this term this Court reasserted that there are some few situations when the Federal Courts must review subpoena prior to contempt. In the case of United States v. Nixon, U.S. (1974), 42 L.W. 5237, 5240, this Court stated as a threshold matter:

> The requirement of submitting to contempt, however, is not without exception and in some instances the purposes underlying the finality rule require a different result. For example, in Perlman v. United States, 247 U.S. 7 (1918), a subpoena had been directed to a third party requesting certain exhibits; the appellant who owned the exhibits, sought to raise a claim of privilege. The court held an order compelling production was appealable because it was unlikely that the third party would risk a contempt situation in order to allow immediate review of the appellant's claim of privilege. Id.

at 12-13. That case fell within the 'limited class of cases where denial of immediate review would render impossible, any review whatsoever of an individual's claims. United States v. Ryan, supra, at 533.

This case is one of the "limited class of cases" this Court mentioned for it arose as a result of a third party subpoena as in Perlman. Just as in Perlman, respondents sought court review of the subpoenas to protect their interests - here, the First Amendment rights of their supporters.

The fact that the subpoenas were issued by a congressional subcommittee in no way diminished the necessity or appropriateness of court review at the stage that it was granted. For as Mr. Justice White noted in United States v. Gravel, 408 U.S. 606 (1972):

> . . .no prior case has held that Members of Congress would be immune if they executed an invalid resolution . . . or, if in order to secure information for a hearing themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability in such circumstances. 408 U.S. at 621. (emphasis added)

Thus, the Committee's assertion of total immunity from judicial review is demonstrably baseless.

It is plain that court review of congressional committee subpoenas has always been available. United States v. Rumley, 345 U.S. 41 (1953); Watkins v. United States. 354 U.S. 178 (1957). The only question has been the timing of that review. Had the Subcommittee sought to obtain the membership records or contributors lists directly from USSF, respondent could have obtained judicial review by refusing to comply with the subpoenas and challenging the constitutionality of the subpoenas in a contempt proceeding. As both the Court of Appeals and the government recognized in Ansara v. Eastland, 442 F.2d 751, 753 (D.C. Cir., 1971), here that route was not available to respondents since they were not subpoenaed directly and "would have no way to claim their constitutional protections at the time of the committee's questioning."

As the Court below correctly noted:

Here, in this case we have the case of

> which is distinguished by this Court in both Sanders and Ansara and apparently by the government in its argument in the latter case. Here the plaintiffs have no alternative means to vindicate their rights. They cannot contest a subpoena issued on the Chemical Bank before the Committee or before the Senate, and they cannot force the bank's uninvolved officials to run the risk of contempt citations and criminal trials to aid the plaintiffs in establishing their First Amendment Rights. 488 F.2d 1252 at 1260.

Here, because the subpoenas were served on third parties, the normal route of review was not available. "[D]enial of immediate review would [have] render[ed] impossible any review whatever of an individual's claims." United States v. Nixon, supra, since the third party banks could not have been expected to resist the subpoenas in order to raise respondents' claims. Therefore, respondents utilized, and the court below granted, the only review available.

The opinion of the Court below will not, therefore, as petitioners contend, "open the door to lawsuits that would cripple the process of legislative inquiry." (Petition, p. 12) It will

merely reach those situations where the legislature attempts to evade court review by issuing indirect subpoenas to third parties who cannot be expected to run the risk of contempt to protect the constitutional rights of the real party at interest, guaranteeing federal review in those few instances when the normal route of review is not available.

II. THE INFORMATION SOUGHT BY PETITIONERS HEREIN HAS LONG BEEN RECOGNIZED AS BEING PROTECTED BY THE FIRST AMENDMENT.

Petitioners have sought to charactierize the information they subpoenaed as simple financial records which fall within the principles of Donaldson v. United States, 400 U.S. 517 (1971) and Couch v. United States, 409 U.S. 322 (1973).

In fact, the information sought is plainly First Amendment protected and this case falls squarely within the principles of such well established cases as Gibson v. Florida Legislative Investigating Committee, 372 U.S. 539 (1962) and NAACP v. Alabama, 357 U.S. 449 (1958).

For the information in question is the functional equivalent of membership lists - the names

and in many cases, addresses of the financial supporters as well as individuals and organizations receiving the financial support of a politically controversial organization. As the court below pointed out:

> The right of voluntary associations, especially those engaged in activities which may not meet with popular favor, to be free from having either state or federal officials expose their affiliation and membership absent a compelling state or federal purpose, has been made clear a number of times. See NAACP v. Alabama, 357 U.S. 449; Bates v. Little Rock, 361 U.S. 516, Louisiana ex rel Gremillion v. NAACP, 366 U.S. 293 (1961); Gibson v. Florida Legislative Committee, 372 U.S. 539 (1962); Pollard v. Roberts, 393 U.S. 14 (1968) affirming the judgment of the three-judge district court for the Eastern District of Arkansas, 283 F. Supp. 248 (1968). United States Servicemen's Fund v. Eastland, supra, 488 F.2d at 1264. (Pet. App. 24a)

In Gibson, supra, a Florida state legislative investigating committee first subpoenaed the entire membership list of the Miami Branch of the National Association for the Advancement of Colored People, alleging that the organization was infiltrated by the Communist Party. When that demand was invali-

dated by the Florida Supreme Court, the committee required the organization's president to appear with the list and answer questions regarding specific members. This Court, recognizing the protected nature of the membership list, reversed Gibson's contempt conviction after he refused to comply with the committee's demands. Even Justice Harlan, joined by Justices Clark, Stewart and White dissenting in that case, implied that the original broadside subpoena which was invalidated by the Florida Supreme Court and which was similar to the sweeping subpoena involved herein would be in violation of the First Amendment rights of the controversial organization and its members. Gibson v. Florida Legislative Investigating Committee, supra at 582.

III. THERE IS NO LIVE CASE HERE.

Normally this Court will consider a constitutional issue when it is absolutely necessary - when, for example, the controversy is a live one. Here, the subpoenas in question are four years old, and

it would appear that whatever the Subcommittee's interest in USSF's records, their investigation of the respondent organizations has long been dead. In fact, prior to filing the Petition for Certiorari herein, the attorney for petitioners Eastland, et al., found it necessary to ask attorneys for respondents whether the United States Servicemen's Fund, whose bank records they had subpoenaed, was still alive. Certainly if the senator and his Subcommittee had continued any real investigation of the respondent organization, they would have been in possession of that most basic information which is available from sources other than bank records. One can only conclude that no live investigation is in process, and that the continued interest of petitioners is at best theoretical. In addition, there is a substantial question of mootness with respect to the subpoenas of the House Committee. */

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*/ There has been no authorization of these investigations by the House since 1970. Since neither the House not its Committees are continuing bodies, McGrain v. Dougherty, 273 U.S. 135 (1927); (fn. continues on next page)

CONCLUSION

The opinion of the court below, which petitioners sought to characterize as a radical departure from prior judicial tradition is merely an

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cf. Anderson v. Dunn, 6 Wheat 204 (1821); Marshall v. Gordon, 243 U.S. 521 (1916), an investigation must be authorized during the term in which it is pursued, Gojack v. United States, 384 U.S. 702, 707 (1966). Although Rule eleven of the Rules of the House (which establishes the Committee on Internal Security adn defines the scope of its authority), has been adopted at the beginning of each session since the subpoenas were issued, there has been no reference to any of the three organizations whose banks were subpoenaed in 1970. See 1973 Annual Report of the Committee on Internal Security of the House of Representatives, H. Rept. 93-771.

Furthermore, it is clear that all House papers die at the end of each session, Rule 26 & 36, Manual of Rules of House of Representatives, 93rd Cong., #384, 92d Cong., 2d Session, 12994. Since these 1970 subpoenas have never been renewed by the Committee they are void and can have no effect on any of these organizations. Therefore, the controversy between the House Committee and the subpoenaed organizations is moot.

application of established law as articulated in Perlman v. United States, supra, as reaffirmed in United States v. Nixon, supra, and Gibson v. Florida State Legislative Investigating Committee and the many other opinions of this Court setting forth the principles which apply where First Amendment rights are at stake.

Finally, the cases themselves are at best dormant, if not completely dead.

Therefore, respondents respectfully urge the Petition for Certiorari herein to be denied.

Respectfully submitted,

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August, 1974

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,412 Sept. Term,1969

United States Servicemen's Fund, et al., Civil Action 1474-70

Appellants,

v.

James O. Eastland, et al.,

Respondents.

Before: Wright, Leventhal and MacKinnon
Circuit Judges,
in Chambers

ORDER

On consideration of appellants' motion for an emergency stay and for a hearing, and of appellees' opposition filed with respect thereto, and to afford an opportunity for this Court to consider the motion more fully, it is

ORDERED by the Court that enforcement of and compliance with the subpoena issued by the Subcommittee on Internal Security of the Committee on the Judiciary of the United States Senate on the Chemical Bank of New York Trust Company for the production of records concerning the account of the United States Servicemen's Fund on May 26, 1970, is stayed pending further order of this Court.

Per Curiam

Judge MacKinnon dissents.